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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1591

WASHINGTON URBAN LEAGUE, INC., ET AL., *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, AND

POTOMAC ELECTRIC POWER COMPANY, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF FOR RESPONDENT POTOMAC ELECTRIC POWER COMPANY IN OPPOSITION

OPINIONS BELOW

The decision of the District of Columbia Court of Appeals entered in this case is set forth in Appendix B of the Petition, and that Court's denial of Petitioner's Petition for Rehearing is set forth in Appendix C of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether an intervenor in a rate proceeding may appeal from a District of Columbia regulatory agency's interlocutory procedural prehearing order specifying the issues to be considered in the proceeding when the intervenor has full opportunity to participate in the proceeding and the right to appeal from any final order of the agency?

2. Whether the equal protection and due process provisions of the Constitution require a regulatory agency to withhold action on an application for a rate increase until it acts upon unsupported allegations that the regulated utility is engaged in employment discrimination, when such allegations are unrelated to the ultimate issue in the rate proceeding and the agency provides for investigation of the allegations in a separate proceeding?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In the opinion of counsel for Potomac Electric Power Company, the pertinent statutory provision is D.C. Code § 43-705, set forth at page 19a of Appendix E of the Petition.

STATEMENT OF THE CASE

Potomac Electric Power Company (hereafter "Pepco") is a public utility company supplying electrical service and power to customers in the Washington, D.C., Metropolitan area. On July 12, 1971, Pepco applied to the Respondent Public Service Commission of

the District of Columbia (hereafter "the Commission") for an increase in its rate of return and its rates for retail electric service in the District of Columbia. Its application became Formal Case No. 568 before the Commission. The Petitioner Washington Urban League, Inc. (hereafter "the Urban League" or "the Petitioner") requested and was granted permission to intervene in Formal Case No. 568.

Following the prehearing proceedings, on October 12, 1971, the Commission issued Order No. 5477, specifying as one issue in the proceeding, *inter alia,* "whether and in what manner, Pepco's employment practices in the District of Columbia, if shown to be discriminatory, affect Pepco's revenues, expenses, or services in the District of Columbia." (App. A of Petition, p. 5a) The Order also stated:

> "Although the Commission is of the view that [the issue of employment practices] may or may not prove to be material and relevant to what it considers the ultimate issue in this case, *i.e.,* the justness, reasonableness, and non-discriminatory nature of retail electric rates in the District of Columbia, it is not disposed at this time to deny to the proponents of [this issue] an opportunity to present evidence on the basis of which relevance and materiality may be persuasively or convincingly demonstrated. That matters such as . . . discriminatory employment practices by utilities in the District of Columbia are proper subjects for investigation by the Commission seems clear. It is equally clear that the Commission has and must exercise its discretion, its expertise, and its judgment in conducting its proceedings to best serve the public interest. It is questionable, however, whether in the orderly and expeditious dispatch of a utility rate proceeding the Commission should properly involve itself and the parties to the pro-

> ceedings, including a utility and its ratepayers in the District of Columbia, in a full scale investigation of issues which may more properly be brought in an independent proceeding." (*Id.*, p. 2a)

Finally, the Commission stated that its specification of issues was "without prejudice to the right of any party . . . to seek (or to institute) separate proceedings with respect to particular matters where that action may appear appropriate." (*Id.*, p. 6a)

Despite the Commission's careful delineation of the issues to include employment discrimination if proven and if related to the ultimate issue in the proceeding, and the fact that such action was without prejudice to seek or institute a separate proceeding, the Urban League filed an Application for Reconsideration of Order No. 5477, objecting to that portion of the Order which limited consideration of Pepco's employment practices to the manner in which these practices, "if shown to be discriminatory, affect Pepco's revenues, expenses, or services in the District of Columbia."

On November 3, 1971, the Commission denied the Urban League's Application for Reconsideration. In stating its reasons, the Commission made clear that it did not propose to disregard evidence of discriminatory practices or to ignore such practices, if shown to be unlawful. The Commission stated that its action established "a procedure under which such evidence [of alleged discriminatory employment practices], if it is brought before us, will be acted upon in this case if related to service or cost of service, but if not so related, we will then determine what future action may be required." (Transcript of Formal Case No. 568, November 3, 1971, pp. 326-28, Appendix H to Opposition, *infra*)

On December 30, 1971, the Urban League filed a Petition of Appeal from Order No. 5477 in the District of Columbia Court of Appeals; its Petition of Appeal also included references to certain Commission evidentiary rulings.[1] On January 18, 1972, the Commission filed a Motion to Dismiss, and on the next day Pepco filed a Notice of Intention to Intervene and a Motion to Dismiss the Petition of Appeal.[2] These Motions to Dismiss contended, *inter alia,* that Order No. 5477, the subject of the Urban League's appeal, was not an appealable final order.

On January 21, 1972, the Urban League filed a Motion for Stay of Order No. 5477 in the District of Columbia Court of Appeals. On February 16 that Court denied the Urban League's Motion to Stay and granted the Motions to Dismiss of the Commission, Pepco, and the Union. The Court subsequently denied the Urban League's Petition for Rehearing and its Motion to Stay the Commission's proceedings pending the timely filing of a petition for a writ of certiorari.

On April 20, 1972, the Commission issued Order No. 5508 in a new proceeding, Formal Case No. 576. (Appendix I to Opposition, *infra*) Order No. 5508 ordered that "an investigation is hereby instituted into the employment practices of Pepco" and also granted

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[1] The Petition makes clear that these evidentiary rulings are not the subject of review. (Petition, p. 26.) Of course, they cannot be because Petitioner did not comply with the jurisdictional requirement of petitioning for reconsideration before the Commission with respect to these rulings. *See* D.C. Code §§ 43-704 and 705 (Appendix E to Petition, pp. 17a-19a).

[2] The Electric Utility Employees' Union (hereafter "the Union") also filed a Notice of Intention to Intervene and a Motion to Dismiss the Petition of Appeal.

leave to intervene in the proceeding, upon the filing of a motion of intent to do so, to the Urban League, the General Services Administration, the Equal Employment Opportunity Commission, and the District of Columbia Office of Human Rights.

On May 9, 1972, the Commission issued Order No. 5509 in the rate case, Formal Case No. 568, containing proposed findings, opinion and order. Order No. 5509 contained a proposed finding that Pepco should be authorized to file revised rates which would produce revenue and a rate of return which would be fair and reasonable, and directed Pepco to file new proposed rate schedules designed to increase its District of Columbia gross operating revenues by $12,152,000. Order No. 5509 also stated at page 20:

> "The question of Pepco's employment practices, which was also an issue in the last Pepco rate case, was raised again here. No evidence was presented, however, and the Commission is aware of none, which would relate employment practices to service or the cost of service in the District of Columbia. We can therefore make no findings with respect to this issue in this proceeding. Nevertheless, in fulfillment of our responsibility in this area we have instituted as of April 20, 1972, a separate proceeding, Formal Case No. 576, in which the question of Pepco's employment practices will be explored." (Appendix J to Opposition, *infra*)

On May 15, 1972, the Urban League filed an Application for Stay pending the filing of the Petition for Writ of Certiorari to the District of Columbia Court of Appeals addressed to the Chief Justice of the United States, which was denied on May 19, 1972.

ARGUMENT

The Urban League's Petition is a blend of unfounded assumptions and specious arguments. It is another attempt to gain judicial review of an interlocutory order of the Commission which the District of Columbia Court of Appeals rejected. Moreover, the Petition's strained attempt to find "conflicts" between the decision below and other judicial decisions is unsuccessful. The record clearly demonstrates no important question of Federal or Constitutional law requiring decision by this Court.

1. THE DECISION BELOW IS CLEARLY CORRECT

Appeals from orders of the Public Service Commission are limited to "final" Commission orders or decisions. D.C. Code § 43-705 (1967 ed.); *see Pollak* v. *Public Utilities Commission,* 191 F.2d 450 (D.C. Cir. 1951), *rev'd on other grounds,* 343 U.S. 451 (1952). Despite this requirement of finality and despite a full opportunity to participate in the Commission proceedings, the Urban League has sought to appeal an interlocutory order of the Commission on procedural questions.

The finality doctrine has particular force where the interlocutory order sought to be reviewed relates to the agency's case-handling procedures. *Chicago Automobile Trade Ass'n* v. *Madden,* 328 F.2d 766, 769 (7th Cir.) *cert. denied,* 377 U.S. 979 (1964). Moreover, an agency's decision with respect to the admission of evidence in proceedings before it is a matter over which it must exercise broad discretion, and review of an interlocutory evidentiary decision should be delayed until review of the agency's final order. *Thermal Ecology Must Be Preserved* v. *Atomic Energy Commission,* 433

F.2d 524 (D.C. Cir. 1970). The Urban League's bare assertion of a Constitutional claim provides no basis for ignoring the finality rule.

Order No. 5477 did nothing more than establish the ground rules for the proceeding by specifying the issues which the Commission determined were relevant to the ultimate issue in the rate proceeding. The rulings in this Order of which the Urban League complains may be considered in conjunction with any later judicial review of any final order which is entered by the Commission in Formal Case No. 568.

The soundness of the reason for the rule of finality is dramatically illustrated by this case. The Urban League's entire Constitutional argument is based on the assumption that the inevitable result of the rate proceeding would be the Commission's granting the "benefit" of a rate increase to Pepco; in fact, the very purpose of the proceeding was to determine *whether* a rate increase was justified. If a party to a rate proceeding were permitted to appeal interlocutory procedural orders of the Commission on the mere assumption that the final order would authorize a rate increase, it would be difficult to conduct expeditious and orderly rate proceedings since the proceedings could be interrupted at any time while frivolous appeals were taken.[3]

The Urban League's attempt to appeal from an interlocutory order is particularly inappropriate here because the Commission repeatedly stated its willing-

[3] The Urban League's argument that the Commission failed to certify the record of its proceedings to the D.C. Court of Appeals pursuant to D.C. Code § 43-705 is specious. Section 43-705 contemplates appeals from a "final" order or decision of the Commission. If the Commission were required to certify its record for appeals from non-final orders, its proceedings would be subject to constant disruption.

ness to consider the Urban League's evidence if related to the issues in the rate proceeding, and if not so related, to consider its evidence in a separate proceeding, and because the Commission has initiated a separate investigation for this very purpose. In view of these facts, the Urban League's assertions that it was denied "the right to participate in the proceeding" and its "right to be heard" must be rejected out of hand.

II. THE COMMISSION IS PRESENTLY CONDUCTING AN INVESTIGATION OF PEPCO'S EMPLOYMENT PRACTICES.

As pointed out by Petitioner (Petition, pp. 11, 12), subsequent to its Order No. 5477 the Commission did initiate an investigation into Pepco's employment practices by Order No. 5508 (Appendix I, *infra*). The propriety of conducting such an investigation in a separate and independent proceeding was suggested by the District Court in *Potomac Electric Power Company* v. *Public Service Commission of the District of Columbia,* C.A. Nos. 2382-70, 2384-70 (D.D.C. 1971) (Appendix G to Petition), one of the primary authorities relied upon by Petitioner. Moreover, the Commission specifically invited the Petitioner, the Equal Employment Opportunity Commission, the General Services Administration, and the District of Columbia Office of Human Rights to participate in this separate investigation.[4]

This investigation completely answers the Urban League's complaint that the Commission is disregarding an alleged statutory or Constitutional "duty" to examine Pepco's employment practices.

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[4] The three Government agencies have specific authority with respect to Pepco's employment practices under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.;* Executive Order No. 11246; and Article 47 of the District of Columbia Police Regulations.

III. THERE IS NO CONFLICT OF DECISIONS

The Petition's strained attempt to find "conflicts" between the decisions of the District of Columbia Court of Appeals and certain other decisions fails. None of the cases relied upon by Petitioner require a regulatory agency to withhold action on an application for a rate increase until it acts upon an intervenor's mere allegations of employment discrimination. Moreover, the Petition's discussion of an alleged "benefit" is totally inappropriate in this case where the Petitioner sought to appeal an interlocutory order at a time when the ultimate result of the rate proceeding was unknown.

Finally, the alleged conflict between the action of the lower court and *Potomac Electric Power Company* v. *Public Service Commission, supra,* does not exist. In that case the court set aside an order of the Commission for a host of reasons, including the lack of substantial evidence to support the order. There is not even a suggestion in the Court's order that the Commission has a duty to investigate Pepco's employment practices which can be satisfied only if the investigation occurs prior to authorizing a rate increase. In fact, the Court in that case clearly suggested the procedure followed by the Commission when it stated that the Commission could examine Pepco's employment practices "either as part of a rate proceeding *or as an independent matter.*" (Appendix G to Petition, p. 25a, emphasis added)

IV. PETITIONER IS NOT ENTITLED TO AN INJUNCTION

As part of its requested relief Petitioner urges this Court "to enjoin further proceedings" before the Commission. (Petition, p. 27) Petitioner has made no showing of entitlement to such extraordinary relief under the accepted criteria governing issuance of an injunc-

tion or stay. *See Virginia Petroleum Jobbers Ass'n* v. *Federal Power Commission,* 259 F.2d 921, 925 (D.C. Cir. 1958). In fact, Petitioner applied to the Chief Justice of the United States for a stay pending the filing of its Petition, and its Application was denied.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Urban League's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX H TO OPPOSITION

Transcript of Proceedings Before the Public Service Commission in Formal Case No. 568, November 3, 1971

PROCEEDINGS

CHAIRMAN WATERMAN: Good morning, gentlemen.

* * * * *

Before we start with the main part of the hearing, the cross examinations and so forth, the Commission would like to make an announcement with regard to two motions pending. The motion by GSA to strike certain portions of the evidence is denied. We believe the objections to the evidence go rather to the weight to be accorded it, rather than the admissability.

The Commission has given most serious consideration to the application for reconsideration filed on behalf of the Washington Urban League on Monday, November 1, 1971, and the oral presentations made on the record yesterday afternoon. We have concluded that the application must be denied. We do want to be sure, however, that our action in denying the application is clearly understood.

First, our action is not based on a lack of jurisdiction or lack of concern over the employment practices of PEPCO. Second, we do not now propose, nor did we propose in Order No. 5477 to "disregard evidence of discriminatory employment practices (Application, page 1)" or "ignore" (Application page 6) such practices, if shown to be unlawful.

It is obvious that neither this Commission nor any other governmental body can take any meaningful action in the areas of discriminatory employment practices on the basis of legal argument, however skillfully presented, which rests on the assumption that discriminatory employment practices exist. At least some factual data or evidence is needed,

and it was to open the door in this proceeding for receipt of such evidence that we included the issue of employment practices in Order No. 5477.

We had thought that this was made clear in our order. What we said and what we did was to establish a procedure under which testimony could be proffered in this case without action in the context of this rate proceeding, dependent on that evidence, if it showed the existence of discriminatory employment practices being connected in some way to service or to the cost of service in the District of Columbia. We also said in our order that this approach will also provide a factual basis not now available for determining what, if any, future action including investigation by the Office of Human Rights, may be required. See our Order No. 5477, page 4.

In short, we will not disregard or ignore evidence of discriminatory employment practices. We do not now have such evidence, but we have established a procedure under which such evidence, if it is brought before us, will be acted on in this case if related to service or cost of service, but if not so related, we will then determine what future action may be required.

* * * * *

APPENDIX I TO OPPOSITION

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1625 I STREET, N.W., WASHINGTON, D.C. 20006

Order No. 5508

April 20, 1972

IN THE MATTER OF

Investigation of the Employment Practices of the Potomac Electric Power Company

Formal Case No. 576

At the beginning of proceedings in the current Potomac Electric Power Company (Pepco) retail rate case (Formal Case No. 568) questions were raised by the Washington Urban League (Urban), an intervenor in that case, concerning the employment practices of Pepco. Specifically, Urban alleged that Pepco discriminated against blacks and other minority groups, and that pending resolution of this issue, the Commission was without legal authority to hear or decide what might be called the normal rate case issues or constitutionally to grant Pepco a rate increase if it found Pepco to be in violation of the constitutional equal employment rights of its workers

By Order No. 5477 dated October 12, 1971, the Commission rejected these contentions of Urban, but did establish as an issue in the rate proceeding, "whether, and in what manner, Pepco's employment practices in the District of Columbia, if shown to be discriminatory, affect Pepco's revenues, expenses, or service in the District of Columbia." In so ordering, the Commission expressly reserved the right to institute separate proceedings with respect to particular matters where that action appeared appropriate.

An application for reconsideration of Order No. 5477 was filed by the Urban on November 1, 1971, oral argument on the application was held, and on November 3, 1971, the petition for reconsideration was denied by the Commission.

As the transcript shows, the denial of the application was not based on a lack of jurisdiction or lack of concern with respect to the employment practices of utilities subject to the Commission's jurisdiction (Tr. 326-329). The Commission's concern was re-emphasized in the Commission's disposition of the Urban's motions for subpoena and interrogatories, and in ruling on the admissibility of the affidavits Urban offered for the record in the rate proceeding. There the Commission announced that it was taking under advisement the question of whether it should institute a separate investigation into the matter of Pepco's employment practices as they relate to the charge of discrimination (Tr. 727-728; 945).

In the course of considering the contentions raised by Urban, the Commission was advised that investigations into Pepco's employment practices were currently being conducted by three other government agencies, General Services Administration (GSA), the Equal Employment Opportunity Commission (EEOC), and the District of Columbia Office of Human Rights. By letters dated January 7, 1972 addressed to each of those agencies, the Commission requested that it be advised of the scope, status and probable completion date of those investigations, as well as of the remedies available to those agencies in the event of findings of unlawfully discriminatory employment practices on the part of Pepco.

While the EEOC investigation appears to be still in progress, the Commission is now informed by GSA that the fact-finding portion of its review of Pepco's employment practices has been completed. We have been advised in summary form of a substantial number of employment practices concerning which questions have been raised by GSA, and in our opinion the apparent nature and extent of these practices appears to be sufficient to warrant the institution of a formal inquiry by this Commission. The phrase "employment practices", covers, of course, not only initial employment but recruitment, promotion, transfer,

employee benefits, and termination. We shall seek to explore each of these facets.

As we have previously stated, we entertain no doubt that we have jurisdiction to investigate the employment practices of utilities subject to our regulatory authority. The statutory basis for our jurisdiction (D.C. Code, Sec. 43-303) was fully detailed in our Order No. 5429 issued April 15, 1970 in Formal Case No. 541. Although our effort to prescribe an affirmative action plan for Pepco in that proceeding was reversed by the court, the reasons for reversal were primarily procedural in nature. On the substance of the matter the Court concluded that the Commission had authority and power to examine Pepco's employment practices, either as part of a rate proceeding or as an independent matter (D., D.C., CA 2382-70 and 2384-70, February 23, 1971).

We will at this time, therefore, enter into an investigation of Pepco's employment practices, as a matter independent of the pending rate proceeding. We view this investigation as essentially factual at the outset, but also necessarily involving a legal question with regard to the nature and extent of the remedial action that this Commission is empowered to take. In the interest of orderly procedure, therefore, we will designate two issues: (1) What are the employment practices of Pepco with respect to minority groups, and (2) Whether these practices are unduly or unlawfully discriminatory.

In consideration of all the circumstances, we will make Pepco and the Electric Utility Employees' Union parties respondent to this proceeding and will grant leave to intervene, upon appropriate notice within 10 days from the issuance of this Order, to GSA, EEOC, the D.C. Office of Human Rights, and Urban. With due regard to our staff resources and our curernt heavy rate case schedule, we will provide, by separate order, for appointment of an agent to investigate the facts and present evidence to the Commission.

THEREFORE, IT IS ORDERED:

Section 1. That pursuant to the provisions of Sections 43-303 and 43-1002 of the D.C. Code, an investigation is hereby instituted into the employment practices of the Potomac Electric Power Company.

Section 2. That the Potomac Electric Power Company and the Electric Utility Employees' Union are hereby designated respondents.

Section 3. That General Services Administration, Equal Employment Opportunity Commission, the District of Columbia Office of Human Rights, and the Washington Urban League are hereby granted leave to intervene in this proceeding, upon the filing of notice of intent to do so within ten (10) days from the date of this Order.

A TRUE COPY:

By the Commission:
/s/ JEREMIAH C. WATERMAN
Chairman

Chief Clerk

APPENDIX J TO OPPOSITION

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1625 I STREET, N.W., WASHINGTON, D.C. 20006

Order No. 5509

May 9, 1972

IN THE MATTER OF

Application of Potomac Electric Power Company for an increase in its rate of return and for an increase in rates for retail electric service.

Formal Case No. 568

Proposed Findings, Opinion and Order

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* * * * *

The question of Pepco employment practices, which was also an isue in the last Pepco rate case, was raised again here. No evidence was presented, however, and the Commission is aware of none, which would relate employment practices to service or the cost of service in the District of Columbia. We can therefore make no findings with respect to this issue in this proceeding. Nevertheless, in fulfillment of our responsibility in this area we have instituted as of April 20, 1972, a separate proceeding. Formal Case No. 576, in which the question of Pepco's employment practices will be explored.

* * * * *